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97-1960

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LAFAYETTE FEDERAL CREDIT UNION, et al.,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY STATEMENT 1

I. THE COMPLAINT ALLEGED ILLEGAL, ULTRA VIRES ACTS 2

II. FIRREA'S ANTI-INJUNCTION BAR DOES NOT APPLY AT THE CONCLUSION OF A CONSERVATORSHIP, OR TO NCUA IN ITS CORPORATE CAPACITY 3

III. FIRREA'S ADMINISTRATIVE CLAIMS PROCESS FOR CREDITORS DOES NOT APPLY TO SHAREHOLDER CLAIMS AGAINST THE NCUA 6

IV. NCUA'S OPPOSITION ABANDONED THE DISTRICT COURT'S RULING THAT ONLY THE NCUA HAD STANDING TO SUE ITSELF 8

V. NCUA'S POSITION ON PLAINTIFFS' DUE PROCESS CLAIM RELIES ON ITS FAILING ARGUMENTS ABOUT THE 10-DAY WINDOW FOR JUDICIAL REVIEW AND THE ADMINISTRATIVE CLAIMS PROCESS 8

TABLE OF AUTHORITIES

Case(s)	Page(s)
Abbott Bld. Corp. v. United States, 951 F.2d 191 (9th Cir. 1991)	4
Elmco Properties, Inc. v. Second National Federal Savings Association, 94 F.3d 914, 923 (4th Cir. 1996)	3
Franklin Savings Association v. Office of Thrift Supervision, 35 F.3rd 1466 (10th Cir. 1994)	1, 4, 5
Freeman v. FDIC, 56 F.3d 1394 (D.C. Cir. 1995)	7
In re Landmark Land Co. of Oklahoma, Inc., 973 F.2d 283, 289 & n.3 (4th Cir. 1992)	3
James Madison Limited v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 737 (1997)	3
Office and Professional Employees Int'l Union, Local 2 v. FDIC, 962 F.2d 63, 68 (D.C. Cir. 1992)	7
Reno v. Catholic Social Services, Inc., 509 U.S. 43, 63-65 (1993)	3
Rosa v. RTC, 938 F.2d 383 (3rd Cir.), cert. denied, 502 U.S. 981 (1991)	1

TABLE OF AUTHORITIES

Cont'd

Page(s)

Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545 (5th Cir. 1993) 1, 6

Suess v. United States, 33 Fed.Cl. 89, 97 (1995) 8

United States v. Winstar Corp., 518 U.S. 839 (1996) 2, 7, 8

Statutes:

12 U.S.C. 1786(h)(3) 3

Administrative Procedure Act, 5 U.S.C. §§ 702, et seq. 4, 5

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). ..... passim

REPLY STATEMENT

Only the National Credit Union Administration Board had the authority to choose between statutory options of conservatorship or liquidation for a one billion dollar credit union. This lawsuit alleges that NCUA's Chairman and staff orchestrated a conservatorship of Capital Corporate Federal Credit Union ("CapCorp"), with a pre-determined intent to liquidate CapCorp's assets without seeking Board approval. A congressional investigation found substantial support for the core allegations of the Complaint--that NCUA's chairman and staff concealed their intent to liquidate CapCorp from two members of the NCUA Board, waited until the 10-day window for a judicial challenge to the appointment of the conservator had closed, and then effected a de facto liquidation of CapCorp under the guise of a "conservatorship."[1] This is a lawsuit against the NCUA as regulator for illegal, ultra vires acts.

NCUA's Opposition to the Petition acknowledges, as it must, that the Third and Fifth Circuits have held that FIRREA's anti-injunction provisions do not apply to suits against regulators in their corporate capacities.[2] The Opposition attempts to explain away another conflict by misreading the Tenth Circuit's opinion in Franklin Savings Association v. OTS, 35 F.3rd 1466 (10th Cir. 1994). The Opposition does not even attempt a defense of the lower court holdings that only NCUA has standing to sue itself, a position directly in conflict with the

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[1] J.A. 63-70.

[2] "Petitioners are correct that a statute barring suit against an agency in its capacity as conservator or receiver does not necessarily preclude an action brought against the agency in its corporate capacity." Brief for the Federal Respondents in Opposition at 15-16 (hereafter "Opposition"), citing Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 547 (5th Cir. 1993), and Rosa v. RTC, 938 F.2d 383, 392 (3rd Cir.), cert. denied, 502 U.S. 981 (1991).

Court of Claims and common sense. Finally, the Opposition cannot explain how FIRREA's administrative claims process bars the claims in this case, but does not apply to the Winstar cases.

I. THE COMPLAINT ALLEGED ILLEGAL, ULTRA VIRES ACTS.

In the Fourth Circuit, NCUA conceded that allegations of illegal or ultra vires conduct are sufficient to defeat FIRREA's anti-injunction bar.[3] However, NCUA baldly asserts that "[t]his case does not involve any ultra vires conduct,"[4] because the Federal Credit Union Act gives the NCUA Board authority to sell assets of an institution after it appoints itself conservator. NCUA asserts that CapCorp had to challenge the imposition of the conservatorship within 10 days or accept the risk that NCUA staff would liquidate all of CapCorp's holdings. According to the NCUA, notice of this risk (regardless of CapCorp's ignorance of NCUA staff's hidden and illegal intent to liquidate CapCorp's assets) rendered judicial review within 10 days meaningful and consistent with the dictates of due process. Opposition at 11.

This argument misses two crucial points. First, the general authority to sell some assets during a conservatorship is not authority to effect a de facto liquidation under the guise of a conservatorship. Second, the Complaint alleged that NCUA staff misled the NCUA Board so that it could accomplish its concealed goal of liquidating CapCorp's portfolio. NCUA's

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[3] See Brief of Appellees at 24 ("ultra vires conduct may be subject to even injunctive relief.")

[4] Opposition at 13-14 & n.6.

Confidential Statement of Grounds for Conservatorship said that the objective of the conservatorship was "to explore all reasonable alternatives to outright liquidation." In violation of that directive from the NCUA Board, NCUA staff carried out a pre-determined plan to liquidate substantially all of CapCorp's portfolio within three weeks, without Board approval. Complaint, paragraphs 16, 21, 26, 27, 28, 29, 30, J.A. 44-46.

These are allegations that NCUA acted "beyond the scope of its statutory authority," In re Landmark Land Co. of Oklahoma, Inc., 973 F.2d 283, 289 & n.3 (4th Cir. 1992). Such allegations are sufficient to defeat FIRREA's anti-injunction provision. See Elmco Properties, Inc. v. Second National Federal Savings Association, 94 F.3d 914, 923 (4th Cir. 1996); James Madison Limited v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 737 (1997).

Although it is black letter law that the allegations of the Complaint must be accepted as true for purposes of NCUA's Motion to Dismiss, Plaintiffs' case is more than artful pleading. A congressional investigation found substantial support for the core allegations of the Complaint. J.A. 63-70.

II. FIRREA'S ANTI-INJUNCTION BAR DOES NOT APPLY AT THE CONCLUSION OF A CONSERVATORSHIP, OR TO NCUA IN ITS CORPORATE CAPACITY.

The plain language of 12 U.S.C. 1786(h)(3) does not state that the actions of the NCUA after the 10-day period will be unreviewable once a conservatorship ends. Without "clear and convincing evidence" of legislative intent to the contrary, the courts presume that judicial review of agency action is available. Reno v. Catholic Social Services, Inc., 509 U.S. 43, 63-65 (1993).

The lower court holdings that FIRREA's 10-day window to challenge conservatorships or liquidations bars subsequent judicial review creates a conflict between the circuits on a vital issue affecting the regulatory structure of the nation's banking system. The Tenth Circuit has stated that the anti-injunction provision will not bar post-conservatorship judicial review. Franklin Savings Association v. Office of Thrift Supervision, 35 F.3d 1466, 1472 (10th Cir. 1994).

NCUA's Opposition grossly misreads the Franklin Savings Association opinion. NCUA argues that the Tenth Circuit held that suits for monetary damages, but not for equitable relief, were available at the conclusion of a conservatorship.[5] The Tenth Circuit really said that equitable relief under the Administrative Procedure Act ("APA") would be available post-conservatorship:

> Our comfort in upholding FIRREA's denial of judicial review of the replacement [of a conservator with a receiver] comes from the possible availability of redress if the Resolution Trust Corporation mismanages a liquidation or improperly liquidates a savings and loan. See Abbott Bldg. Corp. v. United States, 951 F.2d 191, 195 (9th Cir. 1991) (courts have authority to hear a suit alleging governmental banking agency as receiver violated state law). The Administrative Procedure Act protects from agency action that is arbitrary and capricious or in bad faith. . . .
>
> The anti-injunction sections of FIRREA do not seem to block an association from challenging governmental action after-the-fact and seeking compensation for

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[5]Opposition at 12-13.

> wrongs committed. However, the application of the Administrative Procedure Act, the Federal Tort Claims Act, or the Tucker Act is not presented for our review here.

35 F.3d at 1472 & n.7 (emphases added) (footnotes omitted).

The Administrative Procedure Act ("APA") allows only equitable relief. Accordingly, when the Tenth Circuit reasoned that FIRREA allows APA suits at the conclusion of a conservatorship, it recognized that equitable relief, not just monetary damages, would be available in post-conservatorship actions.

NCUA's proposed distinction between post-conservatorship suits for monetary damages and post-conservatorship suits for equitable relief does not make sense. Once a conservatorship ends, Congress would not intend to allow one kind of relief and not the other.

Contrary to NCUA's unsupported assertions, this suit does not restrain or affect the exercise of NCUA's powers as conservator. The conservatorship is over. As the Tenth Circuit wrote in Franklin Savings Association: "post-action suits do not affect or restrain the exercise of powers or functions of the agency actors." 35 F.3d at 1472 & n.7.

Allowing this conflict between the circuits to stand will mean that any banking institution or its shareholders must challenge the imposition of a conservatorship within 10 days, or risk waiving forever any judicial remedies for wrongs during the course of the conservatorships. That will increase the likelihood of litigation. More important, the precedent created by the lower courts in this case will make such judicial challenges unworkable. If a de facto liquidation is legal under a

conservatorship, how will the courts deal with a situation where a conservatorship is reasonable, but a liquidation would be arbitrary and capricious?

Because the anti-injunction provision applies only to NCUA "as conservator," it plainly does not apply to suits against NCUA in its corporate capacity. The Fifth Circuit refused to extend FIRREA's anti-injunction bar to suits for equitable relief against the FDIC in its corporate capacity. Sierra Club, Lone Star Chapter v. FDIC, 922 F.2d 545 (5th Cir. 1993). The lower court opinions in this case create another conflict between the circuits on this point.

III. FIRREA'S ADMINISTRATIVE CLAIMS PROCESS FOR CREDITORS DOES NOT APPLY TO SHAREHOLDER CLAIMS AGAINST THE NCUA.

This is not a case against a receiver or a receivership estate. Plaintiffs are suing the NCUA, not CapCorp, and seek equitable relief requiring NCUA to reconstitute CapCorp's portfolio. Plaintiffs are not asking the courts to order the liquidating agent of CapCorp to do anything. All of the cases interpreting FIRREA's administrative claims process involve "claims" that have the effect of diminishing the receivership estate. The administrative claims process does not apply here, because equitable relief against the NCUA would not decrease the liquidation estate.

NCUA's Opposition does not address this central argument; instead, NCUA mischaracterizes Plaintiffs' argument as mere word play that Plaintiffs are not "creditors." NCUA cites a D.C. Circuit case holding that FIRREA's administrative claims

process applies to claims against a receiver brought by "debtors." Freeman v. FDIC, 56 F.3d 1394 (D.C. Cir. 1995).[6]

Freeman v. FDIC is just one more case in support of Plaintiffs' argument that the administrative claims process does not apply here. Plaintiffs in Freeman were borrowers who sought to enjoin the FDIC, as receiver, from foreclosing on collateral when they defaulted on their loan. The Freemans' claims thus sought to diminish the receivership estate by preventing the receiver from seizing assets. The D.C. Circuit held that the administrative claims process applied to claims by debtors and any other persons with claims against a failed bank. 56 F.3d at 1400-1402. Every case cited by the Freeman opinion involved claimants who sought to diminish the receivership estate in some way, either by bringing affirmative claims against the bank, or by seeking set-offs against debts owed to the bank. 56 F.3d at 1401.

In addition, the Freeman opinion noted that Congress' "core purpose" in enacting FIRREA was to "ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims against the institution." 56 F.3d at 1401 (emphasis added), quoting Office and Professional Employees Int'l Union, Local 2 v. FDIC, 962 F.2d 63, 68 (D.C. Cir. 1992). Claims against the NCUA do not fit this framework.

NCUA argues that because the cases in United States v. Winstar Corp., 518 U.S. 839 (1996) involved breach of contract claims against banking regulators, they did not "seek a determination of rights with respect to the assets of a [liquidated financial institution]." Opposition at 14-15. This distinction is incomprehensible. The Winstar plaintiffs sought a

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[6]Opposition at 15.

determination that they had a contractual right to use regulatory good will, an asset that FIRREA wiped off their books. NCUA's argument thus sweeps too broadly.

The administrative claims process did not apply to the Winstar plaintiffs because there was no dispute about who owned the regulatory good will, and the Winstar plaintiffs sought to add to the liquidation estates of their institutions. Similarly, there is no dispute here that CapCorp owned its securities. This suit is about what the NCUA did to CapCorp's assets; it is not about who owned those assets in the first place.

IV. NCUA'S OPPOSITION ABANDONED THE DISTRICT COURT'S RULING THAT ONLY THE NCUA HAD STANDING TO SUE ITSELF.

The district court held that "[a]bsent contrary guidance from the Fourth Circuit," only NCUA had standing to sue itself. App. 17a. The Fourth Circuit affirmed, adopting the reasoning of the district court. This holding conflicts with the Court of Claims decision in Suess v. United States, 33 Fed.Cl. 89, 97 (1995). NCUA's Opposition did not even attempt to defend the lower court's holding on this issue.

V. NCUA'S POSITION ON PLAINTIFFS' DUE PROCESS CLAIM RELIES ON ITS FAILING ARGUMENTS ABOUT THE 10-DAY WINDOW FOR JUDICIAL REVIEW AND THE ADMINISTRATIVE CLAIMS PROCESS.

NCUA argues that it provided all the process that was due because CapCorp had the opportunity to contest the conservatorship within 10 days, and Plaintiffs had the

opportunity to file administrative claims. Opposition at 15-17. Neither argument addresses the process that Plaintiffs and CapCorp were entitled to receive, but did not.

The Complaint alleges that NCUA recommended the conservatorship of CapCorp with the pre-conceived intent of liquidating CapCorp's portfolio, and without presenting the liquidation of CapCorp to the NCUA Board. CapCorp and Plaintiffs were entitled to have all three members of the NCUA Board cast fully-informed votes on the liquidation of CapCorp. They never received that process. Instead, NCUA liquidated CapCorp's portfolio under a sham conservatorship.

The opportunity to challenge the conservatorship within 10 days could not substitute for the requirement that NCUA follow the requirements of the Federal Credit Union Act. FIRREA's administrative claims process is inapplicable, and cannot substitute for compliance with the Federal Credit Union Act. NCUA again failed to address the core allegations of the Complaint.

If NCUA is correct that FIRREA forbids judicial review of any actions taken more than 10 days after the appointment of a conservator, then FIRREA violates the constitutional requirements of due process.

Respectfully submitted,

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